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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 342

UNITED STATES, PETITIONER

v.

SWISS CONFEDERATION

No. 343

UNITED STATES, PETITIONER

v.

SOCIETY OF CHEMICAL INDUSTRY, BASLE, SWITZERLAND, A JOINT STOCK COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the Court of Claims entered in these cases in favor of respondents.

OPINIONS BELOW

The opinion of the Court of Claims in *Swiss Confederation* v. *United States* (Swiss R. 9–14)[1] is

[1] References to the record in the *Swiss Confederation* case will be designated as "Swiss R. —"; in the *Society of Chemical Industry* case as "Society R. —".

reported at 70 F. Supp. 235; that in *Society of Chemical Industry* v. *United States* (Society R. 10) has not yet been reported.

JURISDICTION

The judgments of the court below were entered on March 3, 1947 (Swiss R. 14, Society R. 10). Motions for new trials, filed by petitioner on April 30, 1947, were overruled on June 2, 1947 (Swiss R. 14, Society R. 11). The time within which to file petitions for certiorari was extended on September 2, 1947, by Mr. Justice Jackson for a period of 30 days up to and including October 2, 1947. The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction of an action instituted by a foreign government to recover just compensation for its property requisitioned by the United States.

2. Whether *United States* v. *New River Collieries,* 262 U. S. 341, requires that the just compensation for requisitioned property be calculated by reference to earlier isolated export transactions where, as here, export trading in such property had been substantially eliminated at the time of the requisition by restrictive regulations of both the United States and Great Britain and where the property owner had failed to qualify

as an exporter of such property under those regulations.

3. Assuming *arguendo* that reference to an "export market" is appropriate, whether the volume sales to the British government should control the determination of the just compensation payable for the property, rather than the few other and isolated sales for export permitted under the restrictive regulations of the United States and Great Britain.

STATUTES INVOLVED

Sections 1 and 2 of the Act of October 10, 1940, c. 836, 54 Stat. 1090 (50 U. S. C. App. 711, 712) and Section 155 of the Judicial Code (28 U. S. C. 261) are set forth in the Appendix, *infra*, pp. 23–25.

STATEMENT

These cases arise out of the requisition in November 1941, of certain quantities of nitration grade toluol, an important ingredient in the manufacture of TNT.

Prior to late 1938, toluol had been sold almost exclusively to domestic users, in accordance with annual contract arrangements, at about 25 cents a gallon in bulk. At about that time, it began to be sought in increasing quantities for export. Despite the offer of premium prices for export, however, the producers, desirous of maintaining their usual outlets, continued to prefer their regular buyers, releasing only quantities not required;

occasionally, also, some regular purchasers would resell to exporters. Although the prices paid for export varied greatly, they did not far exceed the domestic price in cases where purchases were made from producers and producers' agents; where, however, toluol was resold by buyers, the prices were much higher, increasing with successive resales (Swiss R. 6–7).[2]

Notwithstanding the price differential, the supply of toluol for export remained considerably below the demand, and after the outbreak of war in Europe, in September 1939, the export prices rose considerably, causing more toluol to be diverted from the normal channels. By early 1940, though the domestic price was only 28½ cents per gallon in bulk with freight paid by the seller, many sales for export were made at 40 or 50 cents and even higher per gallon. In the second quar-

[2] Most of the toluol sold for domestic use was sold in bulk and shipped in tank cars; most sold for export was transported to seaboard in tank cars and there placed in drums and loaded for shipment. The cost of drumming this toluol varied from 2 to 3 cents per gallon for the labor involved; the cost of the drums varied from 6 to 15 cents, depending on whether the drums were light-gauge metal (non-returnable drums) or heavy-gauge metal (returnable drums). All toluol exported was placed in non-returnable drums, and, according to the custom of the trade, 7 cents per gallon was added to the bulk price for that service. On returnable drum sales, a deposit was usually required from the buyer in excess of the cost of the drums, which amount was refunded if the drums were returned; for this reason, the price was often quoted from 9 to 18 cents per gallon more than the net price for the toluol (Swiss R. 7).

ter of 1940, sales of toluol for export were made at prices varying around 32 to 36½ cents a gallon in bulk and up to 68 cents a gallon in drums. Such speculation, with resultant price inflation, continued rife until several deflating influences appeared in the export market (Swiss R. 6, 7).

First among the curbing influences were the arrangements intiated by the British Purchasing Commission in January 1940, under which it began acquiring practically all the toluol available for export and even a great deal that had formerly been sold in the domestic trade. The prices paid by the British were 28½ cents and 30 cents per gallon in bulk, with freight allowed; 30 cents a gallon was the maximum. At about the same time, the British government established the navicert system; under this procedure, clearance of goods through British-blockaded ports was permitted only upon issuance of a certificate by the British government. The securing of a navicert required about six months, and the navicerts were generally denied except for shipments to Great Britain and her dominions. Most steamships required such certificates before even accepting goods for shipment to or via blockaded ports. The Act of July 2, 1940 (c. 508, 54 Stat. 714, 50 U. S. C. App. 701) supplied a further restraint on the export trade in toluol. This statute prohibited exportation of certain materials to be designated by the President except

upon governmental license, and toluol was one of the materials designated (Swiss R. 7–8, 16–21).

With the establishment of the navicert system and the enactment of the Act of July 2, 1940, active buying and selling of toluol for export practically ceased, and by early 1941, any such trading had practically ceased.[3] Sales for export were pretty much brought to a halt by the order of the Office of Production Management, issued on December 30, 1941, which prohibited any producer of toluol or person who had bought toluol for resale to deliver it to any person for domestic use or export, except upon specific authorization by the Director of Priorities, and which proscribed acceptance of any delivery not so authorized. (Swiss R. 8; Society R. 9).

The requisitions here involved occurred in this latter period, when transactions for export had practically ceased. All the toluol taken by the

[3] Thus, whereas 8,209,000 gallons had been exported in 1940, only 3,308,000 gallons were exported in 1941. Of these, 2,313,000 gallons (70 percent) were shipped to Great Britain and her dominions. Of the remaining million gallons exported, 568,525 were shipped to Russia and 316,132 to Sweden. Of the toluol shipped to Russia, 150,000 gallons were sold in August 1941 and an additional amount a little later, at 35 cents a gallon in bulk. Navicerts were issued and export licenses procured for the Russian shipments. At about the same time, the Swedish government contracted for a certain amount at the same price, but the contract was not performed because the State Department suggested that the Russian government be preferred for such sales (Swiss R. 8–9).

United States had been purchased by respondents for export to themselves in Switzerland, but its shipment had been frustrated by the inability of respondents' agents, despite repeated efforts, to procure either the necessary export licenses or navicerts or both (Swiss R. 4–5, 6; Society R. 4, 6).

Respondent Swiss Confederation, the national government of Switzerland, had purchased approximately 314,059 gallons of toluol on June 30, 1941, at 34 cents a gallon in bulk, with an option to have it delivered aboard ship at New Orleans in drums at an additional charge of 6 cents per gallon (Swiss R. 4). On November 7, 1940, some eight months prior to the purchase, application had been made to the State Department for an export license to export 300,000 gallons, but that application had been rejected in December 1940 "on the grounds that the exportation would be contrary to the interests of national defense" (Swiss R. 4–5. A second application made on October 20, 1941, was granted on November 6, 1941, but only to the extent of permitting the exportation of 31,406 gallons. A navicert was procured for the shipment, and the toluol shipped from New York on December 14, 1941. At that time, Swiss Confederation's agent declared the toluol to be worth slightly in excess of 28½ cents per gallon (Swiss R. 5).

On November 5, 1941, the United States requisitioned 283,188 gallons, the balance of the toluol,

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which Swiss Confederation had not been permitted to export. It was thereupon administratively determined that the fair and just compensation payable was $86,044.37—$80,708.58, or 28½ cents per gallon, for the toluol, and $5,335.79, interest at 4 percent for the delay in payment. The award was rejected, and 50 percent paid to Swiss Confederation, in conformance with statute. (Swiss R. 5–6.)

Respondent Society of Chemical Industry had purchased 104,765 gallons of toluol on April 30, 1940. For this, it had paid 40 cents per gallon in bulk, the seller agreeing to place it in drums for an additional 7½ cents per gallon. This quantity had been drummed and placed in storage at Carteret, New Jersey. Shortly thereafter, the Society had purchased an additional 11,236 gallons at 60 cents a gallon, the seller agreeing to furnish drums and put it in the drums as part of the price. This toluol had also been stored at Carteret, but only a small part was ever drummed. On July 31, 1940, application had been made to the State Department for export licenses to permit exportation of these two lots. Appropriate licenses were granted on August 12, 1940, but shipment thereafter was prevented by the refusal of the British government to grant the necessary navicerts, and the export licenses were cancelled on September 16, 1941 (Society R. 4).

On November 7, 1941, the United States requisitioned 103,887 gallons, the first lot purchased

by respondent Society of Chemical Industry, all stored in drums. It was thereupon determined that the Society was entitled to $37,090.50 as just compensation—$34,802.15, or 33½ cents per gallon, for the drummed toluol taken, and $2,288.35, interest at the rate of 6% for delay in payment. That award was rejected, and 50 per cent paid to the Society on April 4, 1944, in accordance with statute (Society R. 5).[4]

On these facts, the Court of Claims determined that "the fair average market price" of nitration toluol in bulk for domestic users on November 5, 1941, was 28½ cents per gallon, freight to buyer's destination being paid by the seller; and for export purposes, 35 cents per gallon, freight to buyer's destination of not in excess of 2 cents a gallon being paid by the seller (Swiss R. 9). It further found that on November 7, 1941, "The fair average selling price" of toluol in drums for domestic users was 35½ cents per gallon, f. o. b. shipping point, and for export purposes, 42 cents f. o. b. shipping point (Society R. 9). It was the export prices rather than the domestic prices which the Court employed as the proper measure of just compensation (Swiss R. 9, 11–12; Society R. 9–10).

In the *Swiss Confederation* case, the Court further held that the Government of Switzerland had

[4] On August 14, 1942, the United States also requisitioned the 10,943 gallons representing the second lot purchased by the Society (Society R. 5). The Court of Claims sustained the Government's award for this lot, and no question is here raised with respect to it.

standing to sue the Government of the United States in the Court of Claims of the United States (Swiss R. 11).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that, under Section 155 of the Judicial Code, it had jurisdiction to entertain a claim of the Swiss Government against the United States.

2. In holding the doctrine of *United States* v. *New River Collieries*, 262 U. S. 341, to be applicable herein where the requisitioned toluol had been purchased in the United States by respondents, was not intended for sale in export trade, and was available for requisition only because of the inability of respondents to obtain the necessary United States export licenses and British navicerts in order to remove the toluol from the United States for their own purposes.

3. In holding that the doctrine of *United States* v. *New River Collieries* controlled the measure of just compensation for requisitioned toluol where it was shown that there was no free export market.

4. Assuming the doctrine of *United States* v. *New River Collieries* to be applicable in the circumstances of this case, in holding that the measure of just compensation for requisitioned toluol, which had been purchased by respondents for their own purposes, was the price paid in a unique

sale of toluol in an export transaction permitted by the United States.

5. Assuming the doctrine of *United States* v. *New River Collieries* to be applicable in the circumstances of this case, in failing to hold that the market price of toluol, as established by the vast volume of domestic and permitted export sales, constituted the proper measure of just compensation for requisitioned toluol which had been purchased by respondents for their own purposes.

6. In holding that, in the circumstances of this case, just compensation for the toluol requisitioned from the Swiss Confederation was 35 cents per gallon in bulk and for that requisitioned from the Society of Chemical Industry was 42 cents per gallon in drums.

7. In failing to hold that, in the circumstances of this case, just compensation for the toluol requisitioned from the Swiss Confederation was 28½ cents per gallon in bulk, and for that requisitioned from the Society of Chemical Industry was 33½ cents per gallon in drums.

REASONS FOR GRANTING THE WRITS

1. At the outset, the *Swiss Confederation* case poses a jurisdictional question of importance which requires clarification by this Court. The claim involved in that case is the claim of the Swiss government (Swiss R. 4). Petitioner contended that there was no jurisdiction in the Court of Claims over the claims of foreign nations.

The court below held that there was. We submit that its ruling was error.

The jurisdiction of the Court of Claims to entertain suits against the United States has been limited with respect to non-citizen claimants by Section 155 of the Judicial Code which reads, so far as material (28 U. S. C. 261):

> Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims * * *

Under this section, citizens and subjects of numerous foreign governments, including those of Switzerland (*Lobsiger* v. *United States,* 5 C. Cls. 687), have been held entitled to sue the United States. This is the first case, however, so far as we are able to determine, in which the claim of a foreign government, in its sovereign capacity, has been entertained by the Court of Claims. In the past, the court seems to have rejected such claims (*George V, King of the United Kingdom, etc.* v. *United States,* 60 C. Cls. 1027; *Berger* v. *United States,* 36 C. Cls. 243) and, we believe, properly so. Foreign governments do not come within the language of the statute, since they can hardly be said to be "aliens who are citizens or subjects of" themselves. Moreover, the litigation of the claims of foreign nations in the Court of Claims could be productive of such mischief and confusion, to the

prejudice of our relations with such nations, that, in the absence of any express enactment, it seems plain that Congress did not intend that such claims be tried there.

If suits by foreign governments were to be honored in the Court of Claims, it is plain that, like other claimants, such governments might sue the United States only "subject to the conditions annexed by the government to the exercise of the privilege" (*McElrath* v. *United States,* 102 U. S. 426, 440), among them the amenability to set-offs and counterclaims on behalf of the United States. Clearly, the language and purpose of the pertinent counterclaim provision (Section 145 (2), Judicial Code, 28 U. S. C. 250 (2)) are broad enough to encompass counterclaims against foreign nation claimants: "The Court of Claims shall have jurisdiction to hear and determine * * * all set-offs, counterclaims, claims for damages, whether liquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court * * *." *Cherry Cotton Mills* v. *United States,* 327 U. S. 536; *McElrath* v. *United States, supra*; *Allen* v. *United States,* 17 Wall. 207, 210. Government counsel might well be deemed remiss should they fail to assert all available set-offs and counterclaims against foreign governments, and the rejection of such cross-claims by the court as improperly advanced against immune sovereigns (cf. *United States* v.

Shaw, 309 U. S. 495; *United States* v. *United States Fidelity and Guaranty Co.,* 309 U. S. 506) would be unfair to the United States, claims against which would be litigable there.

Consequently, to permit foreign governments to sue in the Court of Claims would throw into domestic litigation the entire complex of international claims, which, as long experience has consistently demonstrated, is far better resolved "through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Ex parte Peru,* 318 U. S. 578, 589. Cf. *Foster* v. *Neilson,* 2 Pet. 253, 307; *Z. & F. Assets Realiz. Corp.* v. *Hull,* 114 F. 2d 464 (App. D. C.), affirmed, 311 U. S. 470; *George E. Warren Corp.* v. *United States,* 94 F. 2d 597 (C. C. A. 2), certiorari denied, 304 U. S. 572. In these circumstances, to infer such an intent from the general language of Section 145 (1) of the Judicial Code (28 U. S. C. 250 (1)) and notwithstanding the restrictions of Section 155 of the Judicial Code (28 U. S. C. 261) would be to impute to Congress an obviously undesirable objective warranted neither by the letter of the statute nor by its legislative history. Cogent and, in our view, controlling considerations of policy imperatively require a ruling that the Court of Claims lacked jurisdiction to entertain the claim of the Swiss Confederation.

Nor did the Act of October 10, 1940 (50 U. S. C. App. 711–713), *infra,* pp. 23–24, dictate a contrary result. That statute, it is

true, authorizes presumably any "owner" of property requisitioned pursuant to its provisions to sue the United States for fair and just compensation, but he may sue only "in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America", *infra,* p. 24. So far as suits in the Court of Claims are concerned, therefore, the Act of October 10, 1940, must be read together with and in light of the provisions of Section 145 of the Judicial Code (28 U. S. C. 250), so that the authority conferred by the 1940 Act is circumscribed by the jurisdictional confines of the Code section. It avails nothing, therefore, to refer to the 1940 statute; the question must be resolved, in any event, by a construction of the general provisions affecting suits in the Court of Claims. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, upon which the court below relies (Swiss R. 10, 11), is by no means dispositive of the question. There, the petitioner was a private corporation, and the Court was careful to note (282 U. S. at 492):

> * * * The question as presented here is not one of a claim advanced by or on behalf of a foreign government or régime, but is simply one of compensating an owner of property taken by the United States.

2. The remaining questions concern both cases, and involve a failure by the Court of Claims to give effect to applicable decisions of this Court.

The requisitions in issue occurred in November, 1941. It is undisputed that, by that time, trading in nitration grade toluol for export had to all practical effect ceased. Thus, the Court of Claims finds that by the early fall of 1941, "sales for export had practically discontinued" (Swiss R. 8). Notwithstanding this uncontroverted finding, the court assumes the existence of an "export market" and an "export price" so definitive as to bring into play the rule of *United States* v. *New River Collieries,* 262 U. S. 341, under which an export market and the prices there prevailing rather than the lower prices in the domestic market are held to control the determination of that compensation which is payable for property destined for export when requisitioned by the United States. In applying that rule to these cases, the Court of Claims erred, for the circumstances here plainly do not warrant the application of the *New River* measure.

In the *New River* case, this Court held that the "market prices for export coal controlled" the computation of the compensation owing for bituminous coal there requisitioned. But the coal there was taken from a producer whose "business * * * was chiefly in the export trade." 262 U. S. at 345, 342. And the Court's holding was made in the light of evidence which unequivocably demonstrated that at the time of the requisition, trading in export coal was quite active: " * * *

There was a strong demand for export coal. There were many buyers * * *. The prices for export coal were considerably higher than for domestic coal. If the coal had not been taken by the United States, it could have been sold by the owner at export market prices." *Id.* at 342–343. And, again: "* * * It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market." *Id.* at 345. In those circumstances, the rule which had been enunciated by the Circuit Court of Appeals was affirmed (*Ibid.*):

> If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles *in volume* were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.

The instant cases, however, are far different from *New River*. By the time the present requisitions occurred, sales of toluol for export had practically ceased. The restrictions imposed by the United States government on the exportation of vital com-

modities such as toluol, on the one hand, and those imposed by the British government on shipments abroad, on the other, had made it practically impossible to export nitration grade toluol. The speculative export market, spawned by war demands, had been cut short. The repeated but vain efforts of respondents' agents to procure the necessary licenses and navicerts to ship their toluol to Switzerland, for which it had been destined when purchased in April, 1940, and June 1941, are adequate testimony of that indisputable fact.

The export trade in nitration grade toluol had dried up by the fall of 1941, and the Court of Claims' attempted conversion of a few isolated sales consummated or almost consummated in August 1941 into a full-fledged export market from which it might posit a price in November 1941 constitutes no more than an exercise in legal legerdemain. Certainly, sales of several hundred thousand gallons at 35 cents per gallon to the Russian government in the *summer* of 1941, graced by requisite export licenses and navicerts, and a prospective sale to the Swedish government at the same time at the same price, aborted by the failure to procure the necessary licenses, hardly furnish the experience upon which to found an export market in the *fall* of 1941, when, as the court finds, that market had disappeared. The only outlet for toluol prevailing in November, 1941, was the

domestic market, and it is the prices in that market which should properly measure the compensation payable to respondents.

It is true that the British Purchasing Commission was still purchasing nitration grade toluol and at least in some part for export. But its purchases were being made at prices closely approximating the price in the domestic market (Swiss R. 7, 17–19). And, in any event, the Court of Claims, in ascertaining the measure of the compensation payable to respondents, expressly chose to disregard the British experience (Swiss R. 13).

Nor is there any significance in the fact that respondents might not have elected to sell their toluol in the domestic market had the toluol not been requisitioned (Swiss R. 6). The refusal of the property-owner to sell in the prevailing market is the very reason for the exercise of the extraordinary power of eminent domain. Notwithstanding respondents' reluctance to dispose of their toluol, they are entitled, under traditional principles, to no more than the market prices prevailing at the time and place of the taking. *L. Vogelstein & Co., Inc.* v. *United States,* 262 U. S. 337, 340.

The decision of the court below goes beyond proper award of just compensation, and, in effect, improperly compensates respondents for damages consequential to valid governmental regulations, in violation of the well-established rule which has

long denied such relief (*Bowles* v. *Willingham*, 321 U. S. 503, 517–519; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188), a tendency also evident in prior decisions of that court in cases involving requisitions. See, *e. g.*, *John J. Felin & Co.* v. *United States*, 107 C. Cls. 155, certiorari granted, 330 U. S. 814, reargument ordered June 9, 1947. To achieve this result, as the Court of Claims has done, by importing the *New River* measure into the situation here presented, where there was plainly no active export market contemporaneous with the taking, is an error so prejudicial to the United States as to require correction by this Court.

3. We submit, then, that it was wrong to have fixed the amount payable to respondents for their requisitioned toluol by reference to an hypothetical export market. If, nevertheless, we were to assume *arguendo* the existence of export trade in toluol at the time of the requisitions, of such regularity and volume as to support the postulation of an "export market", it is obvious that the Court of Claims has misinterpreted and misapplied the prices in that market. For, as we have noted above, p. 19, the court has entirely rejected the experiences of the British Purchasing Commission, which, as the court finds and as the statistics irrefutably show (Swiss R. 7, 8), was by far the most substantial purchaser

of nitration grade toluol for export during 1941. The court says (Swiss R. 13):

> We do not think that the price paid by the British government for toluol, which was less than 35 cents, determines the market value of toluol for export * * *.

And the court continues (*Ibid.*):

> * * * The British Purchasing Commission * * * contracted for practically all that was available for export. Indeed, a great deal was withdrawn from domestic use in order to supply the British needs. This further withdrew from the market the available supply of toluol and made it additionally expensive for any other foreign purchaser to obtain it.

In the light of these statements and in the face of the findings that sales of toluol for export had virtually ceased by the fall of 1941 (presumably excepting sales still being made to the British Purchasing Commission), it is inconceivable, assuming an export market, how one could disregard the experiences of the British in ascertaining what were the prevailing prices in that market in November, 1941. All the toluol which was purchased by the British was purchased at prices about 28½ cents and no higher than 30 cents a gallon in bulk (Swiss R. 7, 17–19). In fixing the fair compensation for nitration toluol in the United States on November 5, 1941, for export purposes, to be 35 cents per gallon in bulk (Swiss

R. 9); and on November 7, 1941, to be 42 cents per gallon in drums (Society R. 9); the Court of Claims therefore erred. For, even were we to assume the existence of an "export market", the records in the instant cases would require that the export price on those dates be determined to be no more than 30 cents per gallon in bulk, the maximum paid by the dominant exporter, the British government.[5]

Even on the present assumption, therefore, the result reached by the court below is so far inconsistent with the facts of record as to call for an exercise of this Court's supervisory jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.

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[5] It is noteworthy too that respondent Swiss Confederation, when it was permitted to export a small portion of the lot of toluol here in question during December, 1941, in accordance with export licenses and navicerts, declared the value of the toluol to be approximately 28½ cents per gallon (Swiss R. 15).

APPENDIX

1. Sections 1 and 2 of the Act of October 10, 1940, c. 836, 54 Stat. 1090 (50 U. S. C. App. 711–712):

whenever the President determines that it is necessary in the interest of national defense to requisition and take over for the use or operation by the United States or in its interest any military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies, necessary for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been denied in accordance with the provisions of section 6 of the Act approved July 2, 1940 (Public, Numbered 703, Seventy-sixth Congress, he is hereby authorized and empowered to requisition and take over for the said use or operation by the United States, or in its interest, any of the foregoing articles or materials, and to sell or otherwise dispose of any such articles or materials, or any portion thereof, to a person or a corporation of the United States whenever he shall determine such action to be in the public interest. Any moneys received by the United States as the proceeds of any such sale or other disposition of any such articles or materials or any portion thereof shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold or

disposed of, and the same shall immediately become available for the purposes named in the original appropriation: *Provided, however,* That nothing in this section shall modify or repeal section 14 of Public Law Numbered 671, 76th Congress, approved June 28, 1940.

SEC. 2. Whenever the President shall requisition and take over any article or material pursuant to the provisions of this Act, the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just. If any such owner is unwilling to accept, as full and complete compensation for such article or material, the sum so determined by the President, such owner shall be paid 50 per centum of the sum so determined by the President and shall be entitled to sue the United States for such additional sum as, when added to the sum already received by such owner, such owner may consider fair and just compensation for such article or material, in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America: *Provided,* That recovery shall be confined to the fair market value of such article or material, without any allowance for prospective profits, punitive or other damages.

2. Section 155 of the Judicial Code (28 U. S. C. 261):

Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of

Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

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NOS. 342 and 343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

UNITED STATES, *Petitioner,*

v.

SWISS CONFEDERATION.

UNITED STATES, *Petitioner,*

v.

SOCIETY OF CHEMICAL INDUSTRY, BASLE, SWITZERLAND,
A JOINT STOCK COMPANY.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

JOHN J. WILSON,
Attorney for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

This brief is submitted jointly by the Swiss Confederation, respondent in No. 342, and Society of Chemical Industry, Basle, Switzerland, respondent in No. 343, in opposition to the petition of the United States for writs of certiorari to review judgments of the Court of Claims.

ARGUMENT.

The Swiss Government Can Maintain this Suit in the Court of Claims.

While respondent feels that, *generally*, there is no prohibition against a foreign government maintaining a suit in the Court of Claims, that *broader* question need not be decided in this instance. The more narrow and simple question is involved here, namely, whether Congress, under the requisition statute here involved, has given its consent that *every owner* of requisitioned property may bring suit for its value against the United States in the Court of Claims. The answer, it is submitted, is in the affirmative upon the authority of *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 75 L. Ed. 473.

In the *Russian Volunteer Fleet* case, the plaintiff, a Russian corporation, was the assignee of certain contracts for the construction of two vessels by a shipbuilding company. Pursuant to the Act of June 15, 1917 (Chap. 29, 40 Stat. at L. 183), an agency of the United States requisitioned these contracts and the vessels being constructed thereunder. The requisitioning Act contained a provision substantially the same as the one under which the seizure was made in the case at bar. At that time, the Russian Government was not recognized by the Government of the United States. It was held that since the plaintiff was given a cause of action under the Act of June 15, 1917, the limitation in Section 261 of 28 U. S. C. should be ignored. This Court pointed out that the case of an alien friend is not excepted from the provisions of Section 250 of Title 28 U. S. C.; and the Court said (p. 491 of 282 U. S.):

> "The Act of June 15, 1917, makes no reference to Section 155 of the Judicial Code, U. S. C. title 28, Section 261, with respect to alien suitors, and the question is whether that provision should be implied as establishing a condition precedent and the recovery thus be defeated. It is at once apparent that such an implication would lead to anomalous results. It would mean that, although the United States had actually taken

possession of the property and was enjoying the advantages of its use, and the alien owner was unquestionably entitled to compensation at the time of the taking, it was the intention of the Congress that recovery should be denied, or at least be indefinitely postponed until the Congress made some other provision for the determination of the amount payable, if it appeared that citizens of the United States were not entitled to prosecute claims against the government of the alien's country in its courts, or that the United States did not recognize the regime which was functioning in that country."

It is clear that the principle of the *Russian Fleet* decision is equally applicable to the case at bar. In that case, this Court held that the *express* statutory limitation of Section 261 would not bar a plaintiff, disqualified thereunder, from recourse to the Court of Claims provided for under the applicable requisitioning statute. In the instant case, the *implied* disqualification of the plaintiff, urged by the petitioner, would, even if true, likewise be no bar to its rights under the Act of October 10, 1940.

The petitioner undertakes, unconvincingly we think, to distinguish the *Russian Fleet* case.

Firstly, it is claimed that the phrase in the statute reading "in the manner provided by sections 41 (20) and 250, Title 28, of the Code of Laws of the United States of America," limits the Court of Claims to whatever its jurisdiction was prior to the enactment of the statute. There are two obvious answers to this argument. One is that there is nothing in Section 250 of Title 28 that ever prohibited the Court of Claims from taking jurisdiction of a suit by a foreign sovereign;[1] and the other and more simple answer

[1] *George V., King of the United Kingdom, etc.*, v. *United States*, 60 C. Cls. 1027, is by no means a clear-cut decision, and although called to the attention of the Court of Claims, was not taken sufficiently seriously even to cause comment upon it in its opinion. *Berger* v. *United States*, 36 C. Cls. 243, was correctly distinguished by the court below in its opinion. (Swiss R. 11.)

is that the phrase "in the manner provided by" merely means "in the Court of Claims."

Secondly, it is argued by the petitioner that, in the *Russian Fleet* case, the claimant was a private corporation, and that this Court expressly distinguished, at page 492 of 282 U. S., that situation from one where the claimant might be a foreign sovereign. However, an examination of the entire context, out of which is taken the quotation relied upon by the petitioner, quickly discloses that this Court did not have in mind any distinction between an *owner* which was a private foreign corporation and one which was a foreign nation, but simply made the quoted statement in relation to the *diplomatic* matter of *recognition* of a foreign government or regime.

The difficulties envisaged by the petitioner on pages 13 and 14 of its Petition are, we respectfully submit, not open for consideration by this Court. Congress has elected to permit *every* dissatisfied owner to file suit under the statute here involved, and it is immaterial whether or not consequences occur as anticipated by petitioner.

The zeal of lawyers has dimmed their perspective for practicalities in this instance, as frequently happens. What difference does it make that the owner is a foreign nation? Congress has promised it fair and just compensation for its requisitioned property. The American courts have adequate machinery to determine this, whoever the owner may be; that is to say, the processes for determining this question are the same in the Court of Claims whether or not the claimant be a foreign nation; and if the foreign nation is willing to come into the American courts, why should the United States Government complain?

In the case of foreign individuals who are claimants, Congress has announced in Section 155 of the Judicial Code (28 U. S. C. 261) a policy of reciprocity. Let it be assumed that this policy should be stretched to include foreign nations. Respondent has established by evidence in this

case (Swiss R. 42-44) that the Swiss courts would be open to petitioner if the factual situation were reversed.

There is clearly no merit to petitioner's argument upon this point.

The Court of Claims Correctly Based Just Compensation Upon Export Prices, and Properly Ignored the British Purchases.

Respondents have combined under the above heading answers to petitioner's second and third points, namely, that the *export* market value and not the *domestic* value should govern here; and that the prices paid by the British Purchasing Commission for toluol should have no bearing upon the case. Moreover, we do not feel that the lower court's decision does violence to *United States* v. *New River Collieries*, 262 U. S. 341.

First, let us dispose of the so-called British sales. Respondents submit that these sales involved a special price, and were not reflective of the true export market price.

The testimony of Mr. Groebe of the Barrett Company shows beyond any peradventure that the sales and prices to the British were very special ones under the circumstances, and that all other foreign exporters were confronted both with difficulties of acquisition of toluol as well as higher prices.

For example, see pages 36-37 of the Swiss Record where Mr. Groebe testified as follows:

> "163 XQ. Isn't it fair to say that because our sentiments were with the British, your principals and yourselves made a special price to the British to get them this toluol?
>
> "A. In so far as Barrett is concerned I would say 'yes'. I don't know what our principals' sentiments were, but we can assume they were the same."

Testifying at the time specifically about sales in 1940, Mr. Groebe was asked and replied, respectively, as follows (Swiss R. 39):

"186 XQ. And you have already said that the price to the British, by virtue of sympathy and related emotions, was a special price?

"A. I wouldn't say it was a special price; it was a lower price.

"187 XQ. It was a lower price. As a matter of arithmetic it was a lower price, but it was a lower price because of special consideration.

"A. Yes."

See, also, the testimony of Mr. Groebe which follows on page 40, and which includes the following question and answer:

"201 XQ. And you are fairly confident that the prices for export purposes to every other purchaser from Barrett were higher than the price to the British?

"A. My recollection is that they were higher."

Mr. Albert Henry Snow, formerly supply officer of the British Purchasing Commission, a witness for the petitioner, testified as follows (Swiss R. 35):

"100 XQ. But, as the Commissioner has amended my question, you now agree with me that if they (purchasers other than the British) could buy it, they had to buy it at a different price than what the British were paying for it?

"A. Yes."

There is no testimony to the contrary with respect to the special status of the British purchases and respondents respectfully submit that these sales provide no criterion whatsoever with regard to the problem involved in these cases.

Consequently, the refusal of the Court of Claims to adopt the prices involved in the British sales is entirely understandable, and is not, as claimed by the petitioner on page 22 of its Petition, "so far inconsistent with the facts of record." Rather, the petition for *certiorari* is completely silent as to these facts of record.

Turning now to petitioner's second point, it is clear from the record that there was a difference between the domestic and the export market value, as the Court of Claims plainly found. (See, e.g. testimony of the witness Schwartz, Swiss R. 31-33).

And, we submit, the requisition in this instance *legally* characterizes the toluol as *export* merchandise. In other words, Section 1 of the Act of October 10, 1940,[2] authorizes the requisition only of property which was "ordered, manufactured, procured or possessed for export purposes." The seizure of the property, therefore, precludes the United States Government from claiming at this point that the property does not have all the attributes of export toluol, including the export price.

In an effort to make its second point, petitioner uses such phrases as "not intended for sale in export trade", "price paid in a unique sale", and "the only outlet for toluol prevailing in November, 1941, was the domestic market."

These phrases are either inapplicable, inaccurate or immaterial.

We are concerned with the value in November, 1941. A sale of 300,000 gallons had been made to the Swiss Government in June 1941 at the export bulk price of 34 cents a gallon. Sales were made to the Russians in August and October of that year at 35 cents. (Swiss R. 30-31.) There was no evidence of export sales during that period at any lower prices.[3] There was nothing unique about these sales. And, as the Court of Claims said in its opinion (Swiss R. 13), it is reasonable to assume that the respondents could have disposed of their toluol to the Russians at an export price of 35 cents if it had not been requisitioned, and thus there was an outlet other than the domestic market.

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[2] Quoted in the Appendix to the Petition for certiorari.

[3] The British sales are not important, as hereinbefore demonstrated.

Moreover, evidence regarding these actual sales was bolstered by the opinion of the witness Schwartz, clearly an expert, that in November, 1941, 35 cents constituted the fair export market price for bulk toluol. (Swiss R. 35.)

In this connection, this Court has said in *United States* v. *Miller*, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336:

> "Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best a guess by informed persons."

It seems clear to respondents that the *New River* case, *supra*, was not misapplied by the lower court, nor extended beyond the obvious spirit of the rule therein stated. Time and again this and other courts have held, in effect, that the owner of condemned property is entitled to be compensated for the highest and most profitable use for which the property is likely to be needed in the reasonably near future. See, e.g., *Olson* v. *United States*, 292 U. S. 246, 78 L. Ed. 1236, 54 S. Ct. 704. Such was plainly the objective of this Court in the *New River* case when it said:

> "Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the circuit court of appeals (276 Fed. 690, 691) that, if the coal had not been taken by the United States, it would have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking."

Petitioner interprets the *New River* case as requiring a flourishing export market. Such may have been the fact in that case, but surely that is not an absolute condition to the application of the benevolent doctrine laid down therein. While petitioner emphasizes the diminution of the export trade, it cannot successfully maintain that it was completely

eliminated. As stated by the lower court and referred to above, the Russians were still potential purchasers of the toluol in November, 1941, and undoubtedly they would have paid respondents 35 cents a gallon for it if respondents had been willing to sell to them.

In any event, petitioner's position is much too narrow. It is undisputed that the toluol was purchased for export, that export prices were paid for it and that it would have been exported but for the inability to obtain the necessary licenses. Moreover, as stated above, the toluol could not have been requisitioned but for its export status. Unlike the coal in the *New River* case, it was not being offered for sale, and there was no need to inquire as to whether it would have gone into the domestic or foreign market. It had been sold, and sold only for export.

The existence of a market is one way of ascertaining a price. There are other methods, as this Court indicated in the *New River* case. Petitioner does not question that export sales in the *second half* of 1941 had been at 34 and 35 cents, nor does it assail the expert opinion of Mr. Schwartz. Stated differently, petitioner does not say at this point that 35 cents is excessive as an export price; it merely says that at the time of requisition, there was virtually no foreign trade in the commodity, and therefore the domestic price must prevail.

Petitioner's contention, we submit, is neither sound nor right, and should not overshadow the obligation of the United States to pay *fair* and *just* compensation for the taking.

On pages 19 and 20 of its Petition, the United States invokes the long-established "sovereign-act" doctrine, claiming in effect that the allowance of the export price instead of the domestic price in this case constitutes compensation for damages suffered by reason of the export-control regulations and navicert system. The lower court recognized this doctrine in its opinion (Swiss R. 13), and scrupulously avoided any conflict with it.

This doctrine has utterly no application to the present situation. Here, one sovereign act prevented exportation, and another one, namely, requisition, seized the property. It is true that respondents are claiming damages, but this is just compensation for the requisition, and none for the governmental act preventing exportation. It is the petitioner which seeks to profit from the governmental acts;—the respondents do not claim damages as the result thereof. In other words, petitioner says that it and the British prevented exportation, and therefore wiped out the export market, and need only pay the domestic price. Respondents reply that they are not claiming the export price as a consequence of the governmental acts of export control and blockade, but because this was the price applicable to their toluol despite such acts.

Twice, petitioner refers to a valution of 28½ cents per gallon being given in connection with the quantity of toluol which the Swiss Government was permitted to export on December 14, 1941.[4] However, reference back to the Swiss Record, page 5, shows that apparently a shipping concern put this valuation in the Export Declaration. Surely, this valuation constitutes evidence of nothing, and can have no effect upon respondents' positions. There can be no doubt that this quantity of toluol, being actually exported, was worth more than the domestic price of 28½ cents, and, even more importantly, if the Export Declaration had been made out by one familiar with the actual facts, a valuation of not less than 34 cents would have been inserted, since the same toluol had been purchased at that price several months earlier (Swiss R. 4).

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[4] This appears near the bottom of page 7 of the Petition for certiorari, at which point petitioner says that respondent's "agent" so declared, and again in footnote 5 on page 22, where it is alleged that the respondent itself so declared.

CONCLUSION.

The decisions below are clearly correct, there is no conflict with the *New River* case, and the questions do not warrant further review. The petition for writs of certiorari should therefore be denied.

Respectfully submitted,

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October, 1947.